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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF CALIFORNIA AND
CALIFORNIA STATE BOARD OF EQUALIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in invoking the federal cause of action for money had and received (*indebitatus assumpsit*) to recover state taxes unlawfully collected from a federal contractor, the United States must comply with state-law requirements (i) that an administrative tax refund claim be filed as a precondition to suit for refund (Cal. Rev. & Tax. Code § 6932 (West 1987)) and (ii) that suit for refund be commenced within 90 days of the administrative denial of the refund claim (Cal. Rev. & Tax. Code § 6933 (West 1987)).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 932 F.2d 1346. The opinion of the district court (Pet. App. 16a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a) was entered on May 16, 1991. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on March 18, 1992 (Pet. App. 24a). The petition for a writ of certiorari was filed on

June 12, 1992, and was granted on October 5, 1992. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 1345 provides, in relevant part:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States * * *.

2. 28 U.S.C. 2415(a) provides, in relevant part:

> * * * [E]xcept as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues * * *.

3. Cal. Rev. & Tax. Code § 6932 (West 1987) provides, in relevant part:

> No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed * * *.

4. Cal. Rev. & Tax. Code § 6933 (West 1987) provides, in relevant part:

> Within 90 days after the mailing of the [Equalization Board's] action upon a [refund] claim * * *, the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction in any city or city and county of this state in which the Attorney General has an office for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> Failure to bring action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.

STATEMENT

Invoking the federal common law cause of action for money had and received (*indebitatus assumpsit*), the United States seeks to recover approximately $11 million in California sales and use taxes paid by the manager of Naval Petroleum Reserve No. 1 with funds supplied by the United States (Pet. App. 2a-3a).

1. Naval Petroleum Reserve No. 1 (the Reserve) is one of three Naval Petroleum Reserves established by the United States.[1] Located in Kern County, California, the Reserve is operated by the United States under a Unit Plan Contract that encompasses property owned by the United States and by Chevron U.S.A., Inc. (J.A. 138-139).[2] The Unit Plan Contract, which was adopted pursuant to the requirements

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[1] The Naval Petroleum Reserves were established pursuant to Section 1 of the Pickett Act of 1910, ch. 421, 36 Stat. 847 (43 U.S.C. 141), which was repealed and replaced by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2744 (43 U.S.C. 1701 *et seq.*). Authority to administer NPR-1 was originally conferred on the Department of the Navy (10 U.S.C. 7420-7438; Exec. Order No. 4614 (Mar. 17, 1927)). On October 1, 1977, this authority was transferred to the Department of Energy (42 U.S.C. 7156).

[2] Approximately 80% of the lands covered by the unit agreement are owned by the United States. Approximately 20% are owned by Chevron. J.A. 139.

of 10 U.S.C. 7426,[3] provides that the United States (i) retains "exclusive control over the exploration, prospecting, development, and operation of the Reserve" (J.A. 140) and (ii) is authorized to conduct activities at the Reserve with its own personnel or "contract for all or any part of such exploration, prospecting, development, and/or operation" (J.A. 141).

Between 1977 and 1985, the United States contracted with Williams Brothers Engineering Company (WBEC) for operation and management of the Reserve.[4] WBEC was thus the government's management contractor for the entire period of the dispute in this case (Pet. App. 2a).

WBEC managed the Reserve under "cost plus" contracts with the United States. Under these contracts, the United States paid WBEC a management fee and, in addition, reimbursed WBEC for the costs it incurred in managing the facility (J.A. 141-142, 150-151, 169). The reimbursable costs specifically included any sales or use taxes assessed in connection with WBEC's management of the Reserve (*ibid.*).

Acting pursuant to federal procurement policies and procedures, WBEC procured goods and services

[3] This statute authorizes adoption of "joint, unit, or other cooperative plans of exploration, prospecting, conservation, development, use, and operation of lands owned or controlled by the United States inside Naval Petroleum Reserve Numbered 1" with adjacent lands "owned or leased by private interests." 10 U.S.C. 7426(a).

[4] WBEC was engaged as manager of the Reserve by the Department of the Navy from 1975 to 1977. When responsibility for the Reserve was transferred to the Department of Energy in 1977, WBEC was retained as manager until August 1, 1985. Pet. App. 2a.

for operation of the Reserve (J.A. 145-151). WBEC had no ownership interest in any of the materials that it purchased for use at the Reserve. The title to all such materials passed directly from the vendor to the United States (J.A. 142, 145-147). These materials were thereafter used by the United States, or by the subcontractors engaged by WBEC under the directions of the United States, in conducting oil field operations at the Reserve (*ibid.*).

As manager, WBEC was prohibited from performing any construction work at the Reserve (J.A. 143, 147, 156). The contractors who performed construction work at the Reserve were hired by WBEC, subject to the government's approval. WBEC was not financially responsible for the performance of subcontractors or for completion of their work. The federal government, not WBEC, bore the risk of subcontractor performance. WBEC monitored subcontractors to ensure compliance with approved plans, but WBEC could not direct subcontractors to take any specific actions without authorization from the United States. The costs of corrective actions—including the increased costs of labor or materials or the costs of settling claims or conducting litigation—were paid by the United States (J.A. 146-150, 169-170).

2. For the years 1975 through 1981, the State of California assessed sales and use taxes in the amount of $14,136,853 for purchases of personal property that WBEC made in the name of the United States for use at the Reserve (Pet. App. 16a; J.A. 151).[5]

[5] Assessments for the years 1975 through 1977 were made on July 5, 1978. Assessments for the years 1978 through 1981 were made on December 13, 1982. J.A. 151.

These assessments were made under Section 6384 of the California Revenue and Taxation Code (the California Code), which taxes sales of personal property to federal contractors "for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State." Cal. Rev. & Tax. Code § 6384 (West 1987). Although the statutory incidence of the tax was on WBEC, the sales to which the tax was applied were of property acquired by the United States.

WBEC applied to the California Board of Equalization for administrative redetermination of the assessments pursuant to Section 6932 of the California Code (Pet. App. 2a, 18a-19a). WBEC contended that, under its contracts with the United States, WBEC would not, and did not, use the property purchased for "the construction of improvements." The purchases were therefore outside the scope of the State's tax provision (Pet. App. 2a). The California Board of Equalization made minor adjustments to the assessments but otherwise rejected WBEC's claims. WBEC then paid the resulting assessments under protest, with funds provided by the United States pursuant to the management contracts (*ibid*; J.A. 142-143, 150-151).

WBEC thereafter filed timely administrative claims for refund, again arguing that the sales were not subject to the California tax because WBEC did not use the property for the construction of improvements (Pet. App. 2a). After the refund claims were denied, WBEC commenced timely actions in state court for refund of the taxes pursuant to Section 6933 of the California Code (Pet. App. 2a). The United States was not joined as a party to the state-court refund actions.

3. During the pendency of the state court proceedings, the State conceded that approximately $3 million of its assessments were invalid because the property involved had been used or installed by government personnel (Pet. App. 2a). The State therefore agreed to refund that portion of the taxes. The State continued to maintain, however, that the remaining $11 million it had assessed and collected—for personal property purchased for the United States by WBEC but installed by other contractors—was authorized under state law (*ibid.*).

By agreement of the parties, WBEC dismissed its state court actions without prejudice in January 1988. The validity of the remaining $11 million of the State's assessments, and of the claims for refund of that amount, was thus left unresolved (Pet. App. 2a).

4. The United States then filed this action in federal district court seeking: (i) a declaration that the California tax was inapplicable to WBEC's purchases of personal property for the United States because WBEC was not engaged in the "construction of improvements" as required by Section 6384 of the California Code; and (ii) a judgment for damages against the State in the amount of $11 million, plus interest, for money had and received under the State's invalid tax assessments (Pet. App. 2a-3a).

The district court granted summary judgment in favor of the State. The court first concluded that the United States had no right to recover the taxes under state law because the federal government had not made a timely administrative refund request (as required by Section 6932 of the California Code) and had not commenced this action within 90 days of the denial of the administrative refund claim filed by

WBEC (as required by Section 6933 of the California Code). The court concluded that compliance with these state procedures was "a condition precedent" to the State's liability in a statutory refund suit (Pet. App. 17a, quoting *United States* v. *California*, 655 F.2d 914, 918-919 (9th Cir. 1980)). In the court's view, compliance with these procedures was an "element of [the plaintiff's] cause of action" (Pet. App. 17a (quoting *United States* v. *California*, 655 F.2d at 918-919)). Because the United States had not complied with those procedures, the court concluded that the United States could not obtain recovery under the State's refund statute (Pet. App. 19a-20a & n.3).

The district court further concluded that the United States was not entitled to seek recovery of taxes from the State under the quasi-contractual common law cause of action for money had and received (*indebitatus assumpsit*). The court stated that an action in quasi-contract cannot be "stretched to include state taxes [paid] under a disputed state statute" (Pet. App. 21a). The court found no "unjust enrichment" of the State, even if the taxes were wrongfully collected, because there was no "unjustness in the state procedures" available for challenging the assessment (*id.* at 23a).

5. The court of appeals affirmed (Pet. App. 1a-15a). The court acknowledged that numerous decisions have held that the United States "may maintain a quasi-contract action independent of state law" for recovery of state-imposed taxes, but stated that those cases "involved classic cases of unjust enrichment" (*id.* at 9a). The court concluded that "[t]his case does not involve classic unjust enrichment such as simple overpayment" but, instead, is based upon "a

state-created exemption from a state created sales tax" (*ibid.*). The court held that any right of recovery in this situation was subject to compliance with state administrative procedures for refund claims and with the state-law requirement that an action for refund be commenced within 90 days of administrative denial of the refund claim (*id.* at 9a-10a, 12a). Since the United States had not complied with those procedures, the court concluded that the State's retention of the allegedly invalid tax did not represent an instance of "classic unjust enrichment" (*id.* at 14a).

In so ruling, the court acknowledged (Pet. App. 12a-14a) that the recent decision of the Eleventh Circuit in *United States* v. *Broward County*, 901 F.2d 1005 (1990), had reached the opposite conclusion on indistinguishable facts. In *Broward County*, the court of appeals concluded that the United States was entitled to recover invalid state taxes assessed against a federal contractor under the "federal common law cause of action in quasi-contract for money had and received" and that "the state statute [imposing a 60-day claim filing deadline] has no application to [that] action" (Pet. App. 13a (quoting *United States* v. *Broward County*, 901 F.2d at 1008-1009)). The Ninth Circuit stated that it disagreed with the Eleventh Circuit's decision in *Broward County* because "there was no unjust enrichment in * * * *Broward County*, and there is none in the case at bar" (Pet. App. 13a).

SUMMARY OF ARGUMENT

From its earliest decisions, this Court has recognized the common law action known as "money had and received" (*indebitatus assumpsit*), under which

a plaintiff may recover money belonging to him that the defendant holds without lawful right. This cause of action exists whether the defendant has received the money directly from the plaintiff or through a third party. One of the earliest applications of this quasi-contractual claim for relief in this Court was to provide a judicial remedy for the recovery of unlawfully exacted taxes. This Court has long recognized that the United States may invoke this federal common law cause of action—without regard to conflicting state-law procedures or remedies—to recover taxes and other funds unlawfully held by the States or others. The United States properly invoked this common law action here to recover the federal funds unlawfully obtained by the State from the federal contractor.

The court of appeals did not dispute (Pet. App. 9a) that a cause of action for "money had and received" exists in favor of the United States. Instead, the court concluded that this federal cause of action is unavailing when the State provides a state-law refund procedure with which the United States has not complied. The court's reasoning was this: If the United States has not pursued available state-law refund procedures, then the State's retention of unlawfully collected taxes does not represent "classic unjust enrichment" (*id.* 14a-15a). The court therefore concluded that the federal remedy is inapplicable in these circumstances (*ibid.*).

This reasoning conflicts with the long line of this Court's decisions holding that, when the United States brings suit to recover unlawfully exacted state taxes, its rights are not circumscribed or limited by state procedures, state statutes of limitations, or state

notions of laches. It is federal law, not state law, that provides procedures and rules of limitations for federal common law causes of action. Since the federal cause of action for money had and received is based upon a contract implied in law, it is subject to the six-year statute of limitations set forth in 28 U.S.C. 2415(a) for claims "brought by the United States * * * upon any contract * * * implied in law" (*ibid.*). The federal claim is not subject to conflicting or additional state limitations or procedural requirements.

In contrast to the decision below, other courts of appeals have consistently held (i) that the United States may invoke the federal common law action for "money had and received" to recover federal funds erroneously exacted from its contractor by a state or local government and (ii) that this claim is not subject to compliance with state procedures or state statutes of limitation. The contrary holding in this case—that the federal cause of action is subject to the restrictions applicable to the state-law cause of action—turns the Supremacy Clause on its head. The existence of a state remedy cannot preempt the federal remedy. The focus of the action for money had and received is upon the existence, or lack, of lawful right of the defendant to hold the plaintiff's money. The State cannot rely upon state-created procedures to avoid an accounting under federal law for its unlawful possession of money that rightfully belongs to the United States. Federal law creates, and governs, the right of the United States to recover its own funds.

The decision of the court of appeals would often leave the United States without an effective remedy to contest a tax improperly exacted from a federal

contractor for which the United States ultimately is responsible. Many States, including California, allow only the putative taxpayer, not third parties, to challenge improper state tax assessments. Even if the United States were allowed to challenge taxes imposed upon federal contractors before state agencies, the application of the differing rules and procedures of the 50 States to the federal claim would result in manifest confusion and undermine the ability of the United States to perfect its right to recover the large sums often at stake.

ARGUMENT

WHEN INVOKED BY THE UNITED STATES TO RECOVER FEDERAL FUNDS DISBURSED TO PAY UNLAWFUL STATE TAXES, THE FEDERAL COMMON LAW CAUSE OF ACTION FOR "MONEY HAD AND RECEIVED" IS NOT SUBJECT TO STATE-LAW REQUIREMENTS APPLICABLE TO STATE-LAW TAX REFUND SUITS

This case concerns the scope and nature of the remedy available to the United States for recovery of funds disbursed to pay unlawfully assessed state taxes. The right of the United States to recover federal funds improperly held by state governments or by others is a question of federal, not state, law:

> When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power * * *. The authority [to do so] had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws [of any State.] The duties imposed upon the United States and the rights acquired by it * * * find their roots in the same federal sources. In absence of an applicable

> Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.

United States v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) (quoting *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943)). "[T]he right of the United States to seek legal redress for duly authorized proprietary transactions 'is a federal right, so that courts of the United States may formulate a rule of decision.'" *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) (quoting Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 410 (1964)). The federal courts are not "restricted to the remedies available in state courts in enforcing such federal rights." *Board of County Commissioners* v. *United States*, 308 U.S. 343, 350 (1939).

A. *Federal Common Law Provides A Cause Of Action To The United States For The Recovery Of Unlawfully Assessed State Taxes*

From its earliest decisions, this Court has recognized the common law cause of action for "money had and received" (*indebitatus assumpsit*), under which a plaintiff may recover money belonging to him that a defendant holds without lawful right. See, *e.g.*, *Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) 137, 156-157 (1836); *Bend* v. *Hoyt*, 38 U.S. (13 Pet.) 263, 265-266 (1839); *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) 720, 731-732 (1866); *Dooley* v. *United States*, 182 U.S. 222, 228 (1901). See also *Moses* v. *Macpherlan*, 2 Burr. 1005, 1012, 96 Eng. Rep. 120, 120-121 (K.B. 1759) (Lord Mansfield); *United States* v. *Compagnie Generale Trans-*

atlantique, 26 F.2d 195 (2d Cir. 1928).[6] The Court has long held that the United States may employ this common law cause of action to recover federal funds unlawfully obtained by others.

For example, in *Bayne* v. *United States*, 93 U.S. 642 (1877), the Court held that this cause of action could be employed by the United States to recover money from a third party who received federal funds that had been misappropriated by a government agent (93 U.S. at 643):

> The law imposes on [the third party] an obligation, and implies a promise on its part, to refund the money to its owner. Such a promise can be enforced by action. Assumpsit will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obligated by natural justice and equity to refund.

In *United States* v. *Wurts*, 303 U.S. 414 (1938)—a suit brought by the United States to recover improperly refunded federal taxes—the Court stated that, under this federal common law action, the

[6] The elements of the common law action are: (1) that the defendant is indebted *ex aequo et bono* to the plaintiff in a certain sum on account of money received by the defendant to the use of the plaintiff; (2) that being so indebted, the defendant impliedly promised the plaintiff to pay him the sum on request; (3) that the defendant has refused to pay the sum; and (4) that, as a result, the plaintiff has been damaged. See C. Keigwin, *Cases in Common Law Pleading* 210-211 (2d ed. 1934); 2 *Andrew's American Law* 1263-1266 (2d ed. 1908); B. Shipman, *Handbook on Common-Law Pleading* 254-259 (3d ed. 1923); C. H. S. Fifoot, *History and Sources of the Common Law* 392-394 (1st ed. 1949).

United States is entitled to recover federal funds that have been "wrongfully, erroneously, or illegally paid." *Id.* at 415.

One of the earliest applications of this quasi-contractual claim for relief in this Court was to provide a judicial remedy for recovery of unlawfully exacted taxes. See *Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) at 156-157; *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) at 731-732 (the "[a]ppropriate remedy to recover back money paid under protest on account of duties or taxes erroneously assessed, is an action of assumpsit for money had and received").[7] The right of the United States to invoke the cause of action for "money had and received" to recover taxes and other funds unlawfully held by the States or others is a "long-established right" (*United States* v. *Wurts*, 303 U.S. at 416). It arises

[7] Although the action for money had and received is often based upon a mistaken or fraudulent payment (see, *e.g.*, *United States* v. *Wurts*, 303 U.S. 414, 416 (1938); *Bayne* v. *United States*, 93 U.S. at 643), the common law remedy is also applicable to "involuntary" tax payments made under "compulsion of law, or under protest, or with notice that [the plaintiff] intends to bring suit to test the validity of the [tax] claim." *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) at 731-732.

Because sovereign immunity barred the private taxpayer from suing the government itself for unlawfully collected taxes, the action of money had and received was maintained against the individual collector. See, *e.g.*, *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) at 731-732. Upon entering the Union, the States waived any claim of sovereign immunity with respect to claims asserted by the United States. *Board of County Commissioners* v. *United States*, 308 U.S. at 351; *United States* v. *Texas*, 143 U.S. 621, 626 (1892); *United States* v. *Nevada Tax Commission*, 439 F.2d 435 (9th Cir. 1971).

under federal common law: "[n]o statute is necessary to authorize the United States to sue in such a case." *Id.* at 415 (quoting *United States* v. *Bank of the Metropolis*, 40 U.S. (15 Pet.) 377, 401 (1841)). See also *United States* v. *Broward County*, 901 F.2d 1005, 1007 (11th Cir. 1990) (the "action sound[s] in *quasi-contractus* for the recovery of its treasury funds"); *United States* v. *Michigan*, 851 F.2d 803, 810 (6th Cir. 1988) (payments received under an invalid state tax result in "unjust enrichment" of the State and create a quasi-contractual obligation for the return of the funds); *United States* v. *Dekalb County*, 729 F.2d 738, 740 (11th Cir. 1984) (same). As the court of appeals stated in *City of New Orleans* v. *United States*, 371 F.2d 21, 28 (5th Cir. cert. denied, 387 U.S. 944 (1967)):

> [T]here is ample power in the [federal courts] to protect the sovereign against such unjust enrichment on familiar principles of money had and received. * * * This harmonizes with the usual principle that Federal law fashions remedies for recovery of funds or property of the United States—including those from invalid tax exactions.

This cause of action exists whether the defendant has received the money directly from the United States or through an intermediary or other third party. See *Gaines* v. *Miller*, 111 U.S. 395, 397 (1884); *Bayne* v. *United States*, 93 U.S. at 643; *Galante* v. *Commodity Credit Corp.*, 71 F. Supp. 963, 966 (S.D. Cal. 1947). It is sufficient for the United States to show that the funds equitably belong to it, even if they were paid to the defendant by another. *Bayne* v. *United States*, 93 U.S. at 643. The United

States may therefore invoke this federal cause of action to recover taxes improperly paid either directly or (as in this case) indirectly through its contractual reimbursement of federal agents or contractors. See, *e.g.*, *United States* v. *Broward County*, 901 F.2d at 1008; *United States* v. *Michigan*, 851 F.2d at 810; *United States* v. *Dekalb County*, 729 F.2d at 741; *City of New Orleans* v. *United States*, 371 F.2d at 28.

B. *The Federal Common Law Cause of Action Is Not Subject To State Statutes Of Limitation Or State Procedures Applicable To State-Law Tax Refund Suits*

The court of appeals did not dispute (Pet. App. 9a) that a cause of action for "money had and received" exists in favor of the United States. The court concluded, however, that this federal cause of action is unavailing when the State provides a state-law refund procedure with which the United States has not complied. The court reasoned that, when the United States has not pursued available state-law refund procedures, the State's retention of unlawfully collected taxes does not represent "classic unjust enrichment" (Pet. App. 14a-15a). Since the United States did not submit an administrative refund request to the State (as required by Section 32 of the California Code)[8] and did not commence a refund action "[w]ithin 90 days after the mailing" of the administrative disposition of such a refund claim (as required by Section 6933 of the California Code), the court of appeals concluded that the United States

[8] A refund request for these taxes was, however, submitted by the federal contractor. See Pet. App. 2a.

was not entitled to recover the state taxes *even if* they had been unlawfully imposed and collected by the State.[9]

1. The court's reasoning is fundamentally flawed. While state rules and procedures properly determine the scope and availability of state-law claims for recovery of taxes, the right of the United States to recover its funds arises under *federal* law. As this Court has stated, when the United States brings suit to recover unlawfully exacted states taxes, its rights are not circumscribed or limited by state procedures, "state statutes of limitations," or "state notions of laches" (*Board of County Comm'rs* v. *United States*, 308 U.S. at 351).

> It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.

United States v. *Summerlin*, 310 U.S. 414, 416 (1940). See also *United States* v. *John Hancock Mutual Life Ins. Co.*, 364 U.S. 301, 308 (1960).[10]

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[9] The court therefore did not consider, or decide, whether the State's tax had been properly imposed in this case. See notes 13 & 16, *infra*.

[10] The 90-day suit commencement provision under state law (Cal. Rev. & Tax Code § 6933 (West 1987)) does not purport to represent a "condition precedent" to the state-law refund action, as the district court erroneously concluded (Pet. App. 17a). Instead, it purports to effect "a waiver of any demand against the state" in the event that the action is not commenced within "the time specified" (Cal. Rev. & Tax. Code § 6933 (West 1987)). The waiver effected by this provision is precisely the type of state-law restriction on federal recoveries that this Court, and the courts of appeals, have refused to allow. See, *e.g.*, *Board of County Commissioners* v. *United States*, 308 U.S. at 349-351; *City of New Orleans* v. *United States*, 371 F.2d at 28.

Federal law provides the procedures and rules of limitation for federal common law causes of action. See *Board of County Commissioners* v. *United States*, 308 U.S. at 350-352. The federal cause of action for money had and received is based upon a contract "implie[d in law]" (*Bayne* v. *United States*, 93 U.S. at 643). That cause of action is therefore subject to the six-year statute of limitations in 28 U.S.C. 2415 (a) for claims "brought by the United States * * * upon any contract * * * implied in law" (*ibid.*). See *United States* v. *Broward County*, 901 F.2d at 1008; *United States* v. *Michigan*, 851 F.2d at 810. The federal claim is not subject to conflicting or additional state limitations or procedural requirements. *Ibid.* As this Court stated in *United States* v. *Summerlin*, 310 U.S. at 417 (citing *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U.S. 123, 126-127 (1919)):

> When the United States becomes entitled to a claim, acting in its governmental capacity, and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement.

The most common application of this federal common law cause of action is for the recovery of taxes improperly imposed by state and local governments on the United States or on its agents and contractors who are entitled to reimbursement from the United States.[11] Both prior and subsequent to the decision

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[11] In addition to the cases discussed in the text, see, *e.g.*, *United States* v. *Nye County*, 938 F.2d 1040 (9th Cir. 1991),

in this case, the courts of appeals have consistently concluded that the quasi-contractual claim for money had and received is *not* limited by the state procedures or state statutes of limitations applicable to state-law tax refund suits. See, *e.g.*, *United States* v. *Benton*, 975 F.2d 511, 513 n.1 (8th Cir. 1992); *United States* v. *Broward County*, 901 F.2d at 1008-1009; *United States* v. *DeKalb County*, 729 F.2d at 741-742; *City of New Orleans* v. *United States*, 371 F.2d at 28. See also *United States* v. *Michigan*, 851 F.2d at 810; *United States* v. *District of Columbia*, 669 F.2d 738, 741-742 (D.C. Cir. 1981); *United States* v. *Bureau of Revenue*, 291 F.2d 677, 678 (10th Cir. 1961).

For example, in *United States* v. *Broward County*, 901 F.2d at 1008, the Eleventh Circuit held that the claim of the United States for recovery of state taxes paid by a federal contractor was not subject to the state-law requirement that suit be commenced within 60 days of certification of the state tax rolls. The court stated (*id.* at 1008-1009):

> [T]he cause of action asserted by the government is not a state law judicial remedy or cause of action but is a federal common law cause of action in quasi-contract for money had and received. In these circumstances the state statute has no application to this action.

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cert. denied, 112 S. Ct. 1292 (1992); *United States* v. *City of Manassass*, 830 F.2d 530 (4th Cir. 1987), aff'd, 485 U.S. 1017 (1988); *United States* v. *Washington*, 654 F.2d 570 (9th Cir. 1981), rev'd on other grounds, 460 U.S. 536 (1983); *United States* v. *California State Board of Equalization*, 650 F.2d 1127 (9th Cir. 1981), aff'd, 456 U.S. 901 (1982).

Similarly, in *United States* v. *Dekalb County*, 729 F.2d at 741-742, the court rejected the contention that the federal cause of action to recover taxes improperly collected from a government contractor was subject to the state-law requirement that the taxes be paid under protest.[12] These and other courts of appeals have consistently concluded that state statutes of limitation and procedural restrictions have no application to the federal action for recovery of state taxes. To the contrary, it is the "usual principle that Federal law fashions remedies for recovery of funds or property of the United States—including those from invalid tax exactions" (*City of New Orleans* v. *United States*, 371 F.2d at 28).

2. In the present case, the court of appeals sought to distinguish these numerous decisions on the theory that the State is not "unjustly enriched" if the United States was entitled to, but did not pursue, an opportunity under state law to challenge the tax in state court (Pet. App. 9a, 13a). But it is not correct to characterize the State's retention of funds improperly obtained from the United States as "just" enrichment.[13] As this Court stated in *United States*

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[12] See also *United States* v. *Benton*, 975 F.2d at 513 n.1 (specifically rejecting the analysis adopted by the court of appeals in this case).

[13] If the contentions of the United States on the merits of the tax claim in this case are correct, the State is holding federal funds improperly obtained from the manager of federal property to pay taxes not legally owed to the State. Sales and use taxes are owed under the State's law only if WBEC purchased the property in question "for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State." Cal. Rev. & Tax. Code § 6384 (West 1987). Since

v. *Wurts*, federal common law allows the United States to recover federal funds that have been obtained "wrongfully, erroneously, or illegally" (303 U.S. at 415). The unlawful collection and retention of taxes by the State represents a classic example of "unjust enrichment of the state" (*United States* v. *Michigan*, 851 F.2d at 810) which the United States

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WBEC performed no construction work, the property could not reasonably be said to have been purchased for WBEC's "use in the performance of contracts with the United States for the construction of improvements." See *United States* v. *Anderson County*, 705 F.2d 184, 187 (6th Cir.), cert. denied, 464 U.S. 1017 (1983). See also note 16, *infra*.

The court of appeals erred in stating (Pet. App. 7a-8a) that this tax dispute involves solely a state law question and that no federal law or program is involved (*ibid.*). As we have pointed out (pages 3-5, *supra*), the Reserve is administered pursuant to 10 U.S.C. 7436 *et seq.*, and *all* disbursements of federal funds were necessarily made pursuant to federal law. Moreover, whether WBEC acquired the property "for use in the performance of contracts with the United States for the construction of improvements on or to real property" (Cal. Rev. & Tax Code § 6384 (West 1987)) requires an interpretation of the federal contracts. The interpretation of a federal contract presents an issue of federal law, just as does interpretation of the federal Constitution or of federal statutes. See *United States* v. *Kimbell Foods, Inc.*, 440 U.S. at 726; *United States* v. *County of Allegheny*, 322 U.S. 174, 183 (1944); *Clearfield Trust Co.* v. *United States*, 318 U.S. at 363. See also *United States* v. *Little Lake Misere Land Co.*, 412 U.S. at 592-593. But even if the pivotal question concerning application of the State's tax did *not* require interpretation of a federal contract, the federal common law action of money had and received would still be available for recovery of federal funds improperly obtained by the State. *E.g.*, *United States* v. *Broward County*, 901 F.2d at 1008; *United States* v. *DeKalb County*, 729 F.2d at 741.

may recover under the federal common law action for money had and received.

The decision in this case subordinates the "long-established right [of the United States] to sue for money wrongfully or erroneously paid from the public treasury" (303 U.S. at 416) to the state-law tax refund cause of action. In doing so, the decision turns the Supremacy Clause on its head. The existence of a state remedy cannot preempt a federal remedy for recovery of funds belonging to the United States.[14] Nor can the State rely upon state-created procedures to avoid an accounting under federal law for its unlawful possession of money belonging to the United States. As this Court has held, the rights of the United States to recover illegally collected state taxes may not "be unduly circumscribed by state law. * * * [S]tate notions of laches and state statutes of limitations have no applicability to suits by the Government" to recover its own funds. *Board of County Commissioners* v. *United States*, 308 U.S. at 351. Federal law, not state law, creates the right of the United States to recover its funds and establishes the limitations on the exercise of that right. See, *e.g.*, *United States* v. *Summerlin*, 310 U.S. at 416; *Board of Commissioners* v. *United States*, 308 U.S. at 351; pages 12-19, *supra*.[15]

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[14] The common law remedy of money had and received was never dependent upon the absence of other applicable remedies. The cause of action of money had and received was developed as a simplified alternative to the more cumbersome common law action of debt. J. Dawson & W. Harvey, *Contracts and Contract Remedies* 92-96 (2d ed. 1969); C. H. S. Fifoot, *supra*, at 363-369.

[15] *United States* v. *State of California*, 655 F.2d 914 (9th Cir. 1980), on which the court of appeals relied (Pet. App. 11a), is inapposite. In *State of California*, the United States

3. The court of appeals erred in suggesting (Pet. App. 9a) that the fact that the federal claim is for recovery of taxes that are unlawful under state law, rather than under federal law, is of relevance to this case. The federal cause of action for money had and received applies whenever federal funds have been "wrongfully, erroneously, or illegally paid" (*United*

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brought suit under Section 13009 of the California Health and Safety Code for recovery of fire suppression costs from persons whose negligence resulted in a forest fire. The recovery sought was wholly dependent upon Section 13009. Any recovery at common law, under the action of trespass on the case, would have resulted in damages measured by the injury to the land that would be substantially different from the fire suppression costs allowable under Section 13009. The United States sued California under the state statute, but failed to comply with administrative claim filing requirements in accordance with what the court found to be a statutory condition precedent to liability. The court held that, since the United States elected to pursue the substantive state statutory cause of action for fire suppression costs under Section 13009, it must satisfy all substantive conditions precedent to such a cause of action. In the present case, however, the United States has not invoked the state tax-refund statute as the basis for its claim for recovery. Rather, the United States has sued the State under the federal common law cause of action for money had and received, for the return of federal monies improperly paid to the State.

For this same reason, *United States* v. *Hartford Accident & Indemnity Co.*, 460 F.2d 17 (9th Cir. 1972), cited by the State (Br. in Opp. 14), is inapplicable. In that case, the court held that any action under California's Uninsured Motorist Law must comply with the statutory condition precedent that the suit be commenced within one year of the accident. The court stated that this one-year period was not a statute of limitations but was an essential element of the claim because, prior to the passage of the Uninsured Motorist Law, no person would have had a cause of action for the type of relief provided by the statute. 460 F.2d at 19.

States v. *Wurts*, 303 U.S. at 415). The fact that state law, rather than federal law, was violated in the erroneous assessment "does not change the nature of the cause of action [for money had and received] or limit the United States to state causes of action for this refund of taxes." *United States* v. *Broward County*, 901 F.2d at 1008.

The right of the United States under federal common law to recover its property when unlawfully taken directly from the United States or from its agents or contractors is not limited to state action that is unconstitutional, as the State contends (Br. in Opp. 2-3, 9). The United States may also invoke this federal common law remedy to recover property unlawfully taken by individuals (see, *e.g.*, *Bayne* v. *United States*, 93 U.S. at 643 (private misappropriation of federal funds)) or by state governments acting in violation of state law (see, *e.g.*, *United States* v. *Broward County*, 901 F.2d at 1008 (incorrect valuation of property under state tax law); *United States* v. *Dekalb County*, 729 F.2d at 741 (same)). The remedy is not limited to situations where the State's action violates the Constitution.[16]

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[16] The United States contends in this case that the State's assessment is invalid under state law because, in purchasing materials for the United States, WBEC did not itself use these materials in the construction of improvements on the federal property. See pages 5, 7, *supra*. The State's statute, on its face, purports only to tax a private contractor's "beneficial use of the property involved" (*United States* v. *New Mexico*, 455 U.S. 720, 741 (1982)). See Cal. Rev. & Tax. Code § 6384 (West 1987). We therefore have not contended that the state statute is facially unconstitutional. See *United States* v. *New Mexico*, 455 U.S. at 741-742.

If, however, notwithstanding its apparently plain language, the statute were interpreted to apply to purchases of prop-

4. The court of appeals' decision would often leave the United States without an effective remedy to contest a tax improperly exacted from a federal contractor for which the United States ultimately is responsible. Many States, including California (Cal. Rev. & Tax. Code § 6932 (West 1987)), require that an administrative claim be presented prior to initiation of a state refund suit. These States often allow only the putative taxpayer, not third parties, to file an administrative refund claim and challenge a tax assessment by a statutory refund suit. See *State Board of Equalization* v. *Superior Court*, 111 Cal. App. 3d 568 (1980)).[17] Other States condition any claim for refund on the requirement that the taxes be paid under protest. See *United States* v. *Dekalb County*, 729 F.2d at 741-742. Even if those States allowed the United States to protest the taxes imposed upon federal contractors, the United States cannot reasonably be expected to be aware of the tax (or the legal issues involved) in sufficient time to participate effec-

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erty for the United States by a federal contractor, such as WBEC, that did *not* make a "beneficial use of the property," the tax, as applied, would be an unconstitutional direct tax on the United States. See *United States* v. *New Mexico*, at 742. See also *Washington* v. *United States*, 460 U.S. 536, 543 (1983) (citing *United States* v. *City of Detroit*, 355 U.S. 466, 473-474 (1958)).

[17] Under 28 U.S.C. 1345, the federal district courts have jurisdiction over all suits commenced by the United States. *See Moe* v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 470 (1976); *United States* v. *Lewisburg Area School Dist.*, 539 F.2d 301 (3d Cir. 1976). California, however, requires tax refund suits to be brought in the state courts. Cal. Rev. & Tax. Code § 6933 (West 1987). It is unclear which law the court of appeals concluded would apply.

tively in the state administrative process. Resort to the California state remedy in this case thus effectively requires the litigation to be waged by the federal contractor—a nominal party with no financial stake in the outcome[18]—instead of by the United States, the real party in interest.

If the state-law requirements for a state-created refund action were enforced upon the United States, the United States would thus often be deprived of its right to challenge and obtain recovery of taxes unlawfully exacted by the States. It is apparent that confusion would reign under the decision in this case if the United States were left to the laws of the 50 States—and to the diligence of disinterested federal contractors[19]—for enforcement of the federal government's claim for money had and received. In fashioning "remedies for recovery of funds or property of the United States" (*City of New Orleans* v. *United*

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[18] Since the United States is responsible for all taxes (see pages 4, 6, *supra*), the contractor obtains no benefit if the taxes are not due.

[19] In *United States* v. *Anderson County*, 761 F.2d 1169 (6th Cir.), cert. denied, 474 U.S. 919 (1985), the United States was permitted to challenge a tax assessment against Union Carbide, a federal contractor. The Sixth Circuit held that Union Carbide had no beneficial interest or use in the Department of Energy's nuclear facility at Oak Ridge, Tennessee, which had been subjected to the Tennessee tax. The court noted that Union Carbide had contradicted the United States' claims by alleging in separate tax proceedings in California that Union Carbide had exclusive possession and use of the nuclear facility, but the court concluded that this statement by Union Carbide was not binding on the United States. The *Anderson County* case is an example of the difficulty that the United States would have in relying upon a federal contractor to protect the government's interest in state tax proceedings.

States, 371 F.2d at 28), other courts have rightly and consistently rejected the suggestion that the sovereign interests of the United States should be subordinated to the vagaries of a mosaic patchwork of state procedures.

CONCLUSION

The judgment of the Ninth Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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